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STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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November 5, 1993

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, D.C. 20554

In the Matter of Implementation of Section 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services - GN Docket No. 93-252

Dear Secretary Caton:

Enclosed please find an original and nine copies of the Initial Comments of the New York State Department of Public Service in the above captioned proceeding.

Sincerely,

Penny Rubin
Assistant Counsel

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FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Summary

The New York State Department of Public Service (NYDPS) submits these comments in response to the Commission's Notice of Proposed Rule Making (NPRM or "Notice") to implement Sections 3(n) and 332 of the Communications Act, as mandated by Congress in the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act"). The NPRM seeks comment on proposals that would (1) address the definitional issues raised by the Budget Act; (2) identify various services, including PCS, affected by the new legislation and describe the potential regulatory treatment thereof; and (3) delineate the provisions of Title II of the Communications Act that will be applied to commercial mobile services and those provisions, that within the bounds of discretion afforded by Congress, will be forborne; and (4) establish procedures for filing of petitions by the states to extend their rate regulation authority over commercial mobile services.

The NYDPS believes that the definition of commercial mobile service should be interpreted broadly so as to ensure that services that are offered functionally on a common carrier basis are treated as such for regulatory purposes. Moreover, a broad interpretation of the definition of commercial mobile service will minimize the need, in light of technological and competitive developments, for the Commission to continually reexamine what constitutes commercial and private mobile services.

As for the regulatory treatment of PCS, the NYDPS believes that most PCS services will involve the provision of common carrier type services; thus, those services must be classified as commercial mobile services. Because there may be PCS applications that do not meet the functional test for classification as a commercial mobile service; however, the Commission should not uniformly treat PCS as a commercial mobile service. Instead, it should classify PCS services either as commercial mobile or private mobile service based upon the nature of the service to be offered. The same standard also should be applied to existing mobile services.

While applicants for PCS licenses should be permitted to offer either commercial or private mobile services, the Commission should initially favor licensees who propose to offer commercial mobile services. In no circumstance, however, should a licensee be permitted to change the nature of its regulatory status during the term of the license by changing the nature of the services they offer. Where a licensee wishes to do so, that license should be opened up to competitive bidding.

With respect to establishing classes or categories of commercial mobile services and providers, the NYDPS recommends that the Commission strive for regulatory parity among similar services, while recognizing the need for different regulatory treatment of dominant and non-dominant providers.

The NYDPS believes it is premature for the Commission to forbear from Title II tariff regulation of the rates for commercial mobile services provided to end users. As a procedural matter, if the Commission chooses to forbear, state petitions to extend rate regulation must be de novo reviewed.

With respect to interconnection, the Commission may not preempt the states from regulating intrastate interconnection rates of commercial mobile service providers. Nor should the Commission preempt the states from rate regulating commercial mobile services unless it is satisfied that consumers in a telecommunications market have the ability to choose among services offered by several firms and no firm or combination of firms has the ability to control the market prices of those services. In judging market conditions, the Commission should take into account both quantitative and qualitative factors.

Definition of Commercial Mobile Service

Section 332(d)(1) provides that a mobile service will be classified as a "commercial mobile service" if it is "provided for profit" and makes "interconnected service" available "to the public" or "to such classes of eligible uses as to be effectively available to a substantial portion of the public.

"Interconnected service" is defined in Section 332(d)(2) as "service that is interconnected with the "public switched network", or service for which an interconnection request is pending under Section 332(c)(1)(B). In the NPRM, the Commission requests comment on how the various elements of commercial mobile service should be defined or interpreted.[1]

a. Service provided for profit

The NYDPS believes that the test for determining the "for profit" nature of a mobile service should be whether the service as a whole is offered on a commercial basis. Under this standard, government and non-profit public safety services operating mobile radio systems solely for their own private, internal use should not be considered as providing mobile radio services for profit.

We believe this interpretation of the "for profit" standard is consistent with Congressional intent. Commercial mobile service is defined as a mobile service "that is interconnected with the public switched telephone network offered for profit and held out to the public."[2] It seems clear that Congress intended that the "for profit" test should refer to the entire service

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[1] The Commission previously determined that merely substituting a radio loop for a wire loop in the provision of basic telephone service does not constitute "mobile service" under the Section 3(n) of the statue. "In the Matter of Basic Exchange Telecommunications Radio Service." 53 Fed Reg 12456, released January 19, 1988, at 27.

[2] Pub. L. No. 103-66, Title VI, § 6002(b), 107 Stat. 312, 395 (1993).

that is being offered, irrespective of whether of not the interconnected portion of the service is offered on a for profit basis. In so doing, it would appear the Congress sought to eliminate the uncertainty that previously had surrounded Section 332.[3]

b. Interconnected Service

The NPRM suggests that Congress intended for the term "interconnected service" to distinguish between systems that are physically interconnected with the public network and those systems that are not only interconnected but also make available interconnected service.

The NYDPS believes that the Commission should focus on the service being offered to end users. Therefore, we recommend that a service be considered as "interconnected" if it provides mobile radio subscribers with the ability to access the public switched network for purposes of sending or receiving messages to or from points on the network. We do not agree with the suggestion that interconnected service rests upon the type of technology used to send and receive messages. (Notice, para. 21) We are particularly concerned that a "regulation by technology" standard

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[3] The recent controversy surrounding the regulatory classification of Fleet Call and other "enhanced" SMRS providers centered on what constituted resale of interconnected common carrier services for profit under the previous Section 332. Fleet Call and others had argued that so long as the interconnected service itself was not resold for profit, the service as a whole should be classified as a private land mobile service.

could result in regulatory disparity between providers offering similar services. Thus, we urge the Commission to establish its regulatory standards for wireless services based upon the service being offered to end users.

Based on this standard of what constitutes interconnected service, store and forward services (e.g., paging services) should be classified as commercial mobile services. If the Commission's primary concern is not to impose new regulatory obligations on today's private land mobile services that now would be reclassified as commercial under existing law, the Commission has the authority under the statue to forbear from Title II regulation of certain commercial services where it can be demonstrated to be in the public interest.

c. Public Switched Network

The NYDPS agrees that the public switched network currently refers to the local and interexchange common carrier switched network, whether by wire or radio. We envision in the future, however, that the public switched network will be comprised of a "network of networks", including both wireline and wireless facilities and services being provided by multiple providers. Thus, the definition of "public switched network" should be written so as to include all networks -- regardless of technology -- that are now or in the future are associated with the provision of switched services to the general public.

d. Service available to the public

The statute requires that commercial mobile service be made available to "the public or to such classes or eligible users as to be effectively available to a substantial portion of the public." We agree with the Commission's view that service offered to the public without restriction should fall under this definition. We also believe that services that are arguably intended for the public or a substantial portion of the public, notwithstanding eligibility restrictions, should be treated as commercial mobile services.

This definition would address several concerns raised in the NPRM. First, it would prevent providers from seeking to impose eligibility restrictions as a means of avoiding classification as a commercial mobile provider. Second, this definition appears to be consistent with Congressional intent that commercial mobile services encompass "broad or narrow classes of users so as to be effectively available to a substantial portion of the public."[4] Third, the definition addresses the Commission's concerns about systems with limited capacity or service areas. Where services are generally available to the public on a first-come basis, they should be treated as commercial services, irrespective of system capacity or service area.

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[4] H.R. Rep. No. 102-313, 103rd Cong., 1st Sess. (1993) ("Conference Report"), at 496.

Definition of Private Mobile Service

The NPRM requests comment on whether a mobile service should be classified as private if (1) it does not meet the literal definition of commercial, or (2) assuming it meets the literal definition, is nonetheless not "functionally equivalent" to a commercial service. (Notice, para. 29)

The legislative history supports the interpretation in paragraph 31 that by adding in conference the reference to "functional equivalence", Congress did not seek to expand the definition of what constitutes private service, but rather to clarify those services that should be classified as commercial.[5]

Therefore, the NYDPS recommends the Commission define commercial mobile services as: (1) services meeting the literal definition of commercial mobile services; or (2) services determined by the Commission to be the "functional equivalent" of commercial mobile service.

Regulatory Classification of PCS

The NPRM suggests that no single regulatory classification be applied to all PCS services. Instead, the Commission seeks comment on several alternatives: (1) allow licensees to choose whether to provide commercial or private land mobile services; (2) provide licensees with the option to provide one category of service on a primary basis and the other on a secondary basis;

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[5] Conference Report at 496.

(3) mandate a threshold level of commercial mobile service that each licensee must provide. (Notice, para. 45-47)

The NYDPS envisions that PCS will involve predominantly the provision of common carrier type services. However, since there may be applications of PCS that do not meet the functional test for classification as a commercial mobile service, the Commission should not uniformly treat PCS as a commercial mobile service at this juncture. Instead, PCS services should be classified either as commercial mobile or private land mobile service based upon the nature of the service being offered. This same standard also should be applied to existing mobile services.

In addition, the NYDPS recommends that the Commission favor allocation of spectrum for the provision of commercial mobile services. PCS has the potential to dramatically impact how telecommunications services are provided to all Americans, and there is a limited amount of spectrum available for PCS. Thus, it is imperative that the primary allocation of PCS spectrum be made to licensees proposing commercial mobile services.

Application of Title II to Commercial Mobile Services

a. Treatment of commercial mobile services and providers

The NPRM tentatively concludes that the Commission may establish different classes and categories of commercial mobile services and promulgate regulations for each class or category (and for individual providers within a class). (Notice, para. 54)

The NYDPS agrees there is a need for establishment of different classes and categories of commercial mobile services,

with regulatory requirements tailored to each. Less certain are the service categories proposed in the NPRM: common carrier mobile services, "certain PCS services" and certain private mobile services. (Notice, para. 55) For example, the Commission does not explain how common carrier mobile services and "certain" PCS services differ under its proposal. Neither does it explain the category of commercial mobile services that would be considered as "private mobile services".[6] Absent some clarification, we are unable to make reasoned conclusions on the merits of these proposed categories.

It is crucial, however, for the Commission to distinguish between dominant and non-dominant commercial mobile service providers. The same concerns regulators have about dominant carriers frustrating wireline competition could also apply to dominant providers in the commercial mobile services market. Thus, the Commission must provide for sufficient regulatory oversight of dominant commercial mobile service providers so as not to limit the potential for competition to fully develop in the commercial mobile services market.

b. Title II forbearance

The Commission tentatively concludes in the NPRM that "the level of competition in the commercial mobile services

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[6] We presume this category is related to the earlier issue of whether a service that met the literal definition of commercial mobile service could nonetheless be classified by the Commission as a private mobile service. (Notice, para. 29)

marketplace is sufficient to permit us to forbear from tariff regulation of the rates for commercial mobile services provided to end users." (Notice, para. 62)

It is premature for the Commission to make such a determination. As a procedural matter, if the Commission chooses to forbear, state petitions to extend rate regulation must be de novo reviewed. In addition, since PCS licenses have not been awarded, a decision to forbear from rate regulation at this time would be applicable only to existing mobile providers.

Preemption of State Interconnection Rate Authority

The Commission seeks comment on whether, under Section 332(c)(3) of the Act, state regulation of interconnection rates of commercial mobile service providers is preempted (Notice, para 71). Section 332(c)(3) expressly provides that notwithstanding Section 2(b) and 221(b) of the Communications Act, states may not regulate the entry of or the rates charged by any commercial mobile service. However, the Act makes clear that this paragraph does not prevent the states from regulating the other terms and conditions of commercial mobile services.

The preemption doctrine, which has its roots in the Supremacy Clause, U.S. Const. art. VI, cl. 2, "requires [the Court] to examine Congressional intent." Fidelity Federal Savings and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152 (1982). The Supreme Court has found Congressional intent to preempt state law where: (1) there is an explicit statement of legislative intent to preempt, (2) the legislative intent may be inferred

from the pervasiveness of the federal legislation, or (3) the intent may be inferred because the federal interest in the field is so dominant. Louisiana v. FCC, 476 U.S. 355, 368-369 (1986); Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 712-713 (1985). Where a federal agency seeks to preempt activities traditionally regulated by the states, such as the historic police powers of the States were not to be superseded * * * unless that was the clear and manifest purpose of Congress'." Hillsborough, 471 U.S. at 715 [quoting Jones v. Rath Packing Co., 430 U.S. 519, 525, (1977)]; Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983).

In this instance, Congress has expressly prohibited the states from setting of the conditions for entry and the rates charged by any commercial mobile service unless it receives permission from the Commission to do so. However, Congress did not expressly permit the Commission to preempt the states from establishing rates for interconnection. Nor can it be implied from the express provision of the statute. In fact the opposite is true. Congress addressed the Commission's role regarding interconnection by adding Section 331(c)(1)(B), and therefore the express language of that provision applies. Specifically, under 331(c)(1)(B) the Commission has the authority to order a common carrier to interconnect with a commercial mobile service provider upon reasonable request, pursuant to its authority under Section 201 of the Communications Act. However, the new Section 332(c)(1)(B) goes on to state that "this paragraph shall not be

construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to . . . [the Communications] Act. Therefore the Commission's authority here is no greater than it would be under Section 201.

In the past, the Commission has acknowledged the limitation on its Section 201 authority.[7] In deciding whether its jurisdiction extended to all charges applicable to the rates that landline carriers charges for cellular interconnection, the Commission "emphasized that its authority is limited to the actual interstate cost of interconnection and ensuring that interconnection is provided for interstate services.[8] The circumstances here are even stronger because Congress explicitly prohibited the Commission from expanding its Section 201 authority over interconnection. Therefore, under the Communications Act Section 152(b), the states retain the authority over charges for or in connection with intrastate communication service. The jurisdiction over intrastate rates for interconnection has not been changed by this new legislation and as a matter of the law, the states cannot be preempted.

State regulation of interconnection rates for commercial mobile service providers also is consistent with policies to ensure just and reasonable rates and to promote competition.

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[7] As it does at paragraph 75 regarding PCS interconnection to the landline system.

[8] In the Matter of the Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services, Report No. CL-379, 2FCC Rcd 2910 (1987) at para. 18.

Even in a market with multiple commercial mobile service providers, subscribers only will have a choice regarding which provider originates their calls and not the provider terminating them. Given its bottleneck control over call termination and in the absence of rate regulation, a commercial mobile service provider would have unlimited discretion in setting its terminating charges. The choice for the subscriber placing the call would be either to pay the terminating charge or not place the call. The ability of a commercial mobile service carrier to exercise such control over call termination charges is contrary to policies designed to ensure just and reasonable rates.

Such control also could have a chilling effect on competition. As the Commission notes, PCS is expected to increase the potential for competition in the provision of local exchange service. In the transition to competition, the incentive and ability of dominant wireline and wireless providers to use their rate structure to favor themselves or affiliated interests, to the disadvantage potential competitors, is a real concern in the absence of rate regulation.

State Petitions to Extend Rate Regulation Authority

The Commission seeks comments on what procedures it should use in determining whether the states should be permitted to continue to regulate commercial mobile services (Notice, para. 79). Section 332(c)(3)(b) permits states to petition the Commission for authority to regulate rates for any commercial

mobile services and the Commission shall grant such petition if the state demonstrates that:

i. market conditions with respect to such services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory; or

ii. such market conditions exist and such service is a replacement for land line telephone exchange service for a substantial portion of the telephone land line exchange service within such State

The Commission may not preempt the states from rate regulating commercial mobile services unless it is satisfied that consumers in a telecommunications market have the ability to choose among commercial mobile services offered by several firms and no firm or combination of firms has the ability to control the market prices of these services. In other words, consumers must have real choice for services that are reasonably interchangeable in a specific market and no one firm or group of firms (absent regulation) should have the ability to unilaterally set prices.

The Commission need not develop a precise mathematical model or formula to differentiate between effective competition and lesser levels of competitive activities. We question whether it is possible to obtain sufficient and reliable data to permit a purely quantitative approach to determining the degree of competition in a market. Therefore, rather than rely solely on a specific set of measurements, the Commission should consider a number of interrelated factors. For example, it should consider the total number of providers from which customers may choose;

the number of customers, the type of service (e.g., residence or business), the distribution of customers between firms; the amount of revenues generated by each firm; each firms rate of return; and service quality information such as consumer complaints. These types of factors should provide a reasonable gauge for judging the effectiveness of competition.

Conclusion

The NYDPS supports a definition of commercial mobile service that focuses on the service being provided to end users. Thus, services offered on a common carrier basis should be treated as commercial mobile services. PCS services should be classified either as commercial or private mobile services based upon the nature of the service being offered. Given the potential impact that PCS could have on provision of telecommunications services to the general public and the limited amount of spectrum available, the Commission intially should favor licenses proposing to offer commercial mobile services. In establishing classes or categories of commercial moblie service providers, the Commission should strive for regulatory parity among similar services, while recognizing the need for different regulatory treatment of dominant and non-dominant providers.

It is premature for the Commission to forbear from Title II rate regulation of commercial mobile services. As a procedural matter, if the Commission elects to forbear, state petitions to extend rate regulation must be de novo reviewed. The Commission may not preempt state regulation of interconnection rates for

commercial mobile services under Section 332(c)(3). Nor should states be preempted from rate regulating commercial mobile services unless the Commission is satisfied that consumers in a telecommunications market have the ability to choose among services offered by several firms and no firm or combination of firms has the ability to control the market prices of those services. In judging market conditions, the Commission should take into account both quantitative and qualitative factors.

Respectfully submitted,

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Dated: November 6, 1993
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